

EXHIBIT A

EXHIBIT A

CONFIDENTIAL PAGES IN BLUEWATER SUBMISSION AS OF FEBRUARY 16, 2007						
ITEMS TOTAL PART OR ALL OF 70 PAGES						
Atlantic North Form Name	Page #	Description	JUSTIFICATION: Either "Trade Secret" (TS) OR "Confidential/ Financial" (CF) Categories Defined In 2/16/07 Bluewater Wind Brief to PSC	Date No Longer Confidential	Harm If Released NOTE: See Robert Howatt email of 2/15/07 9:35 am	Level of Competitive Harm: High/Medium/Low (H, M, L) NOTE: See Robert Howatt email of 2/15/07 9:35 am
D	5	Vestas Performance Guarantee	TS	Until such time as Vestas adopts new and different commercial terms, or discontinues this line of wind turbines, or when patent protection expires, as applicable	Vestas loses competitive advantage with other turbine manufacturers	H
D	9	Vestas Wind Turbine Generator (WTG) Technical Data	TS	Until such time as Vestas adopts new and different commercial terms, or discontinues this line of wind turbines, or when patent protection expires, as applicable	Vestas loses competitive advantage with other turbine manufacturers	H
G	6	Calculation of wind resource losses and methodology	CF	Energization of first wind turbine, expected in 2011	Competitive disadvantage with other offshore wind developers in US	M
G	9	12 X 24 Matrix of megawatt- hours delivered to busbar	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other RFP Bidders	M
G-Appendix 1	1-22,34-36	Wind Resource Assessment	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other RFP Bidders	M
G-Appendix 2	1	Additional wind studies methodology	CF	Energization of first wind turbine, expected in 2011	Competitive disadvantage with other offshore wind developers in US	M

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O	2-11	Financial Information	CF	Notification to Bluewater of Winning Bid	Competitive disadvantage with other offshore wind developers in US. Competitive disadvantage with other RFP Bidders.	H
O-Appendix-1	1-15	Bluewater Financial Model	CF, TS	Date Bluewater Wind LLC and affiliates exit wind business.	Competitive disadvantage with other offshore wind developers in US. Competitive disadvantage with other RFP Bidders.	H
Q	1-6	Vestas and Fluor O & M Plan: Cost and Methodology	CF	Until such time as Vestas and Fluor adopt new and different commercial terms, or Vestas discontinues this line of wind turbines, or when patent protection expires, as applicable	Vestas loses competitive advantage with other turbine manufacturers. Fluor loses competitive advantage with other EPC contractors.	H
R	1-5	PPA Pricing	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other offshore wind developers in US. Competitive disadvantage with other RFP Bidders.	H
S	1-4	Imputed Debt Offset Analysis	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other offshore wind developers in US. Competitive disadvantage with other RFP Bidders.	H

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Atlantic South Form Name	Page #	Description	JUSTIFICATION: Either "Trade Secret" (TS) OR "Confidential/ Financial" (CF) Categories Defined in 2/16/07 Bluewater Wind Brief to PSC	Date No Longer Confidential	Harm If Released NOTE: See Robert Howatt email of 2/15/07 9:35 am	Level of Competitive Harm: High/Medium/Low (H, M, L) NOTE: See Robert Howatt email of 2/15/07 9:35 am
D	4	Vestas Performance Guarantee	TS	Until such time as Vestas adopts new and different commercial terms, or discontinues this line of wind turbines, or when patent protection expires, as applicable	Vestas loses competitive advantage with other turbine manufacturers	H
D	8	Vestas Wind Turbine Generator (WTG) Technical Data	TS	Until such time as Vestas adopts new and different commercial terms, or discontinues this line of wind turbines, or when patent protection expires, as applicable	Vestas loses competitive advantage with other turbine manufacturers	H
G	6-7	Calculation of wind resource losses and methodology	CF	Energization of first wind turbine, expected in 2011	Competitive disadvantage with other offshore wind developers in US	M
G	9	12 X 24 Matrix of megawatt- hours delivered to busbar	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other RFP Bidders	M
G-Appendix 1	1-21,31-33	Wind Resource Assessment	CF	Notification to Bluewater of winning bid	Competitive disadvantage	M

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G-Appendix 2	1	Additional wind studies methodology	CF	Energyization of first wind turbine, expected in 2011	Competitive disadvantage with other offshore wind developers in US	M
O	2-11	Financial Information	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other offshore wind developers in US. Competitive	H
O-Appendix-1	1-15	Bluewater Financial Model	CF, TS	Date Bluewater Wind LLC and affiliates exit wind business	Competitive disadvantage with other offshore wind developers in US. Competitive disadvantage with other RFP Bidders.	H
Q	1-6	Vestas and Fluor O & M Plan: Cost and Methodology	CF	Until such time as Vestas and Fluor adopt new and different commercial terms, or Vestas discontinues this line of wind turbines, or when patent protection expires, as applicable	Vestas loses competitive advantage with other turbine manufacturers. Fluor loses competitive advantage with other EPC contractors.	H
R	1-5	PPA Pricing	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other offshore wind developers in US. Competitive disadvantage with other RFP Bidders.	H
S	1-4	Imputed Debt Offset Analysis	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other offshore wind developers in US. Competitive disadvantage with other RFP Bidders.	H

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PAGES IN BLUEWATER SUBMISSION AS OF FEBRUARY 16, 2007

PART OR ALL OF 86 PAGES PLUS 7 SHARED DOCUMENTS

Shared Document Name	Page #	Description	JUSTIFICATION: Either "Trade Secret" (TS) OR "Confidential/Financial" (CF) Categories Defined in 2/16/07 Bluewater Wind Brief to PSC		Date No Longer Confidential	Harm if Released NOTE: See Robert Howatt email of 2/15/07 9:35 am	Level of Competitive Harm: High/Medium/Low (H, M, L) NOTE: See Robert Howatt email of 2/15/07 9:35 am
Shared Document 2	ALL	Vestas Technical Specifications: Electrical, SCADA, Monitoring, Sub-contractors, and O & M	TS;CF		Until such time as Vestas adopts new and different commercial terms, or discontinues this line of wind turbines, or when patent protection expires, as applicable	Potentially fatal to public companies position in the marketplace. See WolfBlock February 15, 2007 brief for more details.	H
Shared Document 3	1-9	Ramboll-Bluewater Contract	TS;CF		Until such time as Ramboll adopts new and different commercial terms	Significant competitive harm with respect to its US and European competitors	M
Shared Document 4	ALL	SEAS-NVE and ABB substation and cabling cost and technical analysis	TS;CF		Until such time as SEAS and ABB adopt new and different commercial terms, or discontinue these pieces of equipment or when patent protections expire, as applicable	Significant competitive harm with respect to its US and European competitors	H
Shared Document 6	12, 15, 16	Wind Park Insurance Pricing	CF		Until such time as Marsh adopts new and different commercial terms	Significant competitive harm with respect to its US and European competitors	H
Shared Document 7	1-16	Fluor-Bluewater letter agreement and EPC Scope of work	CF		Until such time as Fluor adopts new and different commercial terms	Significant competitive harm with respect to its US and European competitors	H
Shared Document 8	ALL	Vestas-Bluewater turbine supply, erection commissioning O & M proposal	TS;CF		Until such time as Vestas adopts new and different commercial terms, or discontinues this line of wind turbines, or when patent protection expires, as applicable	Potentially fatal to public companies position in the marketplace. See WolfBlock February 15, 2007 brief for more details.	H

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Shared Document 9 (Unrevised Version of Shared Document 34)	ALL	Ballast Nedom Foundation, Design, Supply Load Analysis and Soil Analysis	TS,CF	Until such time as Ballast Nedom adopts new and different commercial terms	Significant competitive harm with respect to its US and European competitors	H
Shared Document 10	ALL	Interconnection Proposal by Downes Associates; Technical, cost, and project development methodology	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other RFP bidders	M
Shared Document 11	ALL	NOTE: Category 2 Document as per 2 16 07 Bluewater Brief. Marine environment analysis: Phase One; Geology, Oceanography, traffic, natural resources, and archaeology	CF	Notification to Bluewater of winning bid; or upon release of same information by other RFP bidders	Significant competitive disadvantage with other RFP bidders, and other offshore wind developers	M
Shared Document 12	ALL	NOTE: Category 2 Document as per 2 16 07 Bluewater Brief. Marine environment analysis: Final report; Geology, Oceanography, traffic, natural resources, and archaeology	CF	Notification to Bluewater of winning bid; or upon release of same information by other RFP bidders	Significant competitive disadvantage with other RFP bidders, and other offshore wind developers	M
Shared Document 15	1-4	SEAS-Bluewater Letter Agreement	CF	Until such time as SEAS adopts new and different commercial terms	Significant competitive harm with respect to its US and European competitors	M

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Shared Document 23	1-11	Vestas Availability Guarantee	TS;CF	Until such time as Vestas adopts new and different commercial terms, or discontinues this line of wind turbines, or when patent protection expires, as applicable	Serious harm to public companies position in the marketplace. See WolfBlock February 15, 2007 brief for more details.	M
Shared Document 28 (electronic version of Form O-Appendix 1)	CD-ROM	Bluewater Financial Model	CF;TS	Date Bluewater Wind LLC and affiliates exit wind business	Competitive disadvantage with other offshore wind developers in US. Competitive disadvantage with other RFP Bidders.	H
Shared Document 29	1-6	Bluewater Financial Statements and Development Expenses	CF	Date Bluewater Wind LLC and affiliates exit wind business	Competitive disadvantage with other offshore wind developers in US. Competitive disadvantage with other RFP Bidders	H
Shared Document 30	1-5	Fluor EPC Scope of work and cost data	CF	Until such time as Fluor adopts new and different commercial terms	Significant competitive harm with respect to its US and European competitors	H
Shared Document 31	1-7	ABB onshore substation equipment specifications and design	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other RFP bidders	L
Shared Document 34 (Revised Version of Shared Document 9)	ALL	Ballast Nedam Foundation, Design, Supply Load Analysis and Soil Analysis	TS;CF	Until such time as Ballast Nedam adopts new and different commercial terms	Significant competitive harm with respect to its US and European competitors	H
Shared Document 36	1-2	SEAS offshore substation O & M budget	CF	Until such time as SEAS adopts new and different commercial terms	Significant competitive harm with respect to its US and European competitors	H
Shared Document 38	1	HSH Nordbank Financing Letter	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other RFP bidders	M
Shared Document 39	1-2	Babcock & Brown Financing Letter	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other RFP bidders	M
Shared Document 40	1-2	Meridian Clean Fuels, LLC Financing Letter	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other RFP bidders	M
Shared Document 41	1-2	Fortis Capital Corp.	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other RFP bidders	M

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Shared Document 42	1-12	Senior secured development loan, construction loan, term loan, and letter of credit facility Term Sheet	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other RFP bidders	M
Shared Document 44	1-3	Downes Associates UCAP Definition and Interpretation	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other RFP bidders	L
Shared Document 46	1	Bluewater Risk Mitigation Programs Overview	CF	Notification to Bluewater of winning bid	Competitive disadvantage with other RFP bidders	L

EXHIBIT B

(See shared file on Bluewater web site)

EXHIBIT C

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

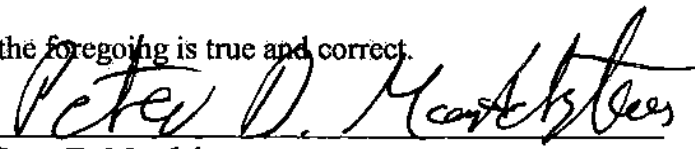
IN THE MATTER OF THE INTEGRATED)	
RESOURCE PLANNING FOR THE PROVISION)	
OF STANDARD OFFER SUPPLY SERVICE BY)	
DELMARVA POWER & LIGHT COMPANY)	
UNDER 26 DEL. C. § 1007 (c) & (d): REVIEW)	
AND APPROVAL OF THE REQUEST FOR)	PSC DOCKET NO. 06-241
PROPOSALS FOR THE CONSTRUCTION OF)	
NEW GENERATION RESOURCES UNDER 26)	
DEL. C. § 1007 (d))	

AFFIDAVIT OF PETER D. MANDELSTAM

State of New York)	
)	
County of New York)	

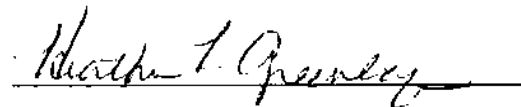
I, Peter D. Mandelstam, hereby declare and aver that I have reviewed the information that remains redacted from the Bluewater Wind Delaware LLC proposal as described in the attached Brief Regarding Confidentiality of Documents submitted in Response to Request for Proposals and I have determined, to the best of my ability, that this information is confidential and/or proprietary and thus should not be subject to inspection by members of the public or other parties to these proceedings.

I declare under the penalty of perjury the foregoing is true and correct.


Peter D. Mandelstam

STATE OF DELAWARE)
)
COUNTY OF NEW CASTLE)

Subscribed and sworn to (or affirmed) before me this 16th day of February, 2007 by Peter D. Mandelstam, personally known to me or proved to me on the basis of satisfactory evidence to be the person who appeared before me.



Signature of Notary Public

HEATHER F. GREENLEAF
NOTARY PUBLIC
STATE OF DELAWARE
My Commission Expires April 18, 2010

EXHIBIT D

October 6, 2003

Civil Division-Kent County (739-7641)

Thomas S. Neuberger, Esquire
Two East Seventh Street, Suite 302
Wilmington, DE 19801-3707

Re: Freedom of Information Act Complaint Against New Castle County

Dear Mr. Neuberger:

Our Office received your Freedom of Information Act ("FOIA") complaint on June 23, 2003 alleging that New Castle County ("the County") violated FOIA by not providing you with the names, addresses, and policy numbers of any insurance carriers which underwrite public official coverage for the County.

By letter dated June 30, 2003, we asked the County to respond to your complaint. We received the County's response on July 9, 2003. The County contends that the information you requested is exempt from disclosure under FOIA for two reasons: (1) "the [insurance] coverage information contained in the policy contains confidential commercial or financial details"; and (2) the information requested "falls within the pending or potential litigation exception."

Relevant Statutes

FOIA requires that "[a]ll public records shall be open for inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body." 29 Del. C. § 10003(a).

FOIA exempts from disclosure any "[t]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature." 29 Del. C.

§ 10002(d)(2). FOIA also exempts from disclosure "records pertaining to pending or potential litigation which are not records of any court." *Id.* § 10002(d)(9).

Legal Authority

A. Confidential Commercial or Financial Information

FOIA's exemption for confidential commercial or financial information protects

"Individuals from a wide range of embarrassing disclosures," Att'y Gen. Op. 87-IO31 (Nov. 4, 1987) (quoting *Gregory v. FDIC*, 470 F. Supp. 1329, 1334 (D.D.C. 1979)). For example, the "release of information regarding one's assets, profits and losses, stock holdings, loans and collateral" are confidential financial information exempt from disclosure under FOIA. Att'y Gen. Op. 87-IO31. See also Att'y Gen. Op. 86-IB30 (Sept. 25, 1986) (tax returns of parents of children applying for scholarships exempt from disclosure under FOIA).

The FOIA exemption for confidential commercial or financial information may apply "when the government requires a private party to submit information as a condition of doing business with the government." *Judicial Watch v. Export-Import Bank*, 108 F. Supp.2d 19, 27 (D.D.C. 2000). To fall within the exemption, the government has the burden of showing that disclosure of the information "is likely to cause substantial harm to the competitive position of the person from whom the information was obtained." *Judicial Watch*, 108 F. Supp.2d at 29. In *Judicial Watch*, the federal district court held that the government had met its burden. "When an applicant has submitted its export insurance application to the Bank, the requested transaction is in a highly competitive state. Other U.S. exporters and foreign competitors may be competing simultaneously for the same transaction or project. Thus, financial and technical details of the proposed transaction are confidential, and, if released, could harm the submitter's commercial interests." *Id.* at 29.

There is no evidence in the record to suggest that disclosure of any information contained in the County's public official insurance policy might cause competitive harm to the insurer. The routine information contained in an insurance contract — premiums, scope of coverage, deductibles — relate to the expenditure of public funds, a core FOIA function. The public has a right to know whether claims against the County's public officials may be settled "with public funds or with insurance proceeds generated by publicly financed insurance premiums." Att'y Gen. Op. 02-IB24 (Oct. 1, 2002) (quoting *Daily Gazette Co. v. Withrow*, W.Va. Supr., 350 S.E.2d 738, 743 (1986)). See *Associated Builders & Contractors v. Pennsylvania Department of General Services*, Pa. Cmwlth., 747 A.2d 962, 966 (2000) ("Because the purchase of insurance constitutes the disbursement of funds by an agency, any construction insurance policies for the Keystone Project are public records.").

We determine that an insurer's name, address, and policy number are not "commercial or financial information obtained from a person which is of a privileged or confidential nature." 29 Del. C. § 10002(d)(2).

B. Pending Litigation

The County contends that the pending litigation exemption under FOIA applies because

Renee Sutton has sued your client, Robert S. Weiner, in Superior Court for invasion of privacy and slander. According to the County, Mr. Weiner has formally notified the County of his "claim that he was being sued for actions allegedly arising from his official duties as an elected official and that he expected the County to assume his client's defense. The County has officially declined to provide representation to Mr. Weiner asserting that these actions did not arise out of his official duties. Therefore, in addition to the existing litigation against Mr. Weiner, litigation against the County for refusing to provide representation in connection with Ms. Sutton's claim is likely to occur in light of his expectation of representation."

FOIA's pending litigation exemption may apply if a party to a lawsuit is trying to use FOIA to circumvent the rules of discovery. See *Koyste v. Delaware State Police*, Del. Super., C.A. No. 00C-08-088-JEB

(Sept. 18, 2001) (Babiarz, J.) (plaintiff "is attempting a circuitous route around the normal discovery rules"). For the pending litigation exemption to apply, there must be a sufficient nexus between the records requested under FOIA and the subject matter of the litigation. Arguably, there may be a nexus between the Sutton litigation and the defendant's entitlement to representation at the County's expense. But if the insurance information you requested from the County is relevant to the Sutton litigation, then your remedy is through third-party discovery. If the County successfully moves to quash a third-party subpoena on the ground of relevance, then necessarily there is no nexus between the insurance information you requested and the subject matter of the lawsuit. In either event, FOIA's pending litigation exemption does not apply.

C. Potential Litigation

For the potential litigation exemption to apply, "FOIA requires a two-part analysis: first, litigation must be likely or reasonably foreseeable; and second, there must be a clear nexus between the documents requested under FOIA and the subject matter of the potential litigation." Att'y Gen. Op. 02-1B30 (Dec. 2, 2002)). If Mr. Weiner sues the County to compel the County to afford him legal representation in the Sutton lawsuit, then there would be a clear nexus between a public official insurance policy and the subject matter of a lawsuit brought by Mr. Weiner. The legal issue, then, is whether such litigation is likely or reasonably foreseeable.

"A realistic and tangible threat of litigation is one that can be characterized with reference to objective factors" such as: (1) a formal demand letter or some comparable writing that represents the party's claim and manifests a solemn attempt to sue; (2) previous or pre-existing litigation between the parties or proof of ongoing litigation concerning similar claims; or (3) proof that a party has retained counsel with respect to the claim at issue and has expressed an intent to sue." *Claxton Enterprises*, 549 S.E.2d 870, 874 (2001).

By letter dated May 20, 2003, you made a demand on behalf of your client to the County Attorney to "provide counsel to defend [Ms. Sutton's] claim to Mr. Weiner and file a timely answer." We believe that retaining counsel and this demand letter are objective criteria of a reasonable and tangible threat of litigation by Mr. Weiner over the scope of the County's public official insurance coverage policy.

Our determination that the insurance information you requested is exempt from disclosure under FOIA's potential litigation exemption is not at odds with our determination, earlier in this opinion, that a public body's insurance contracts may be public records under FOIA in other contexts. The potential litigation exemption turns on the identity of the requestor and the purpose of the request in light of reasonably foreseeable litigation. Where those criteria are not satisfied, a public body's insurance contracts may be public records unless exempted under another provision of FOIA.

We do not express any opinion whether Mr. Weiner, as a member of the New Castle County Council, might have standing to access the insurance information he has requested as a public official and potential beneficiary under the policy. That is a question of local law which is not within our jurisdiction under FOIA.

Conclusion

For the foregoing reasons, we determine that the County did not violate the public records requirements of FOIA by refusing to provide you with documents that contain the names and addresses of insurers and the insurance policy numbers because the records containing that information fall within the potential litigation exemption under FOIA.

Very truly yours,

W. Michael Tupman

Deputy Attorney General

APPROVED

Westlaw

Del. Op. Atty. Gen. 77-037, 1977 WL 24790 (Del.A.G.)

Page 1

(Cite as: Del. Op. Atty. Gen. 77-037, 1977 WL 24790 (Del.A.G.))

Del. Op. Atty. Gen. 77-037, 1977 WL 24790
(Del.A.G.)Office of the Attorney General
State of Delaware
OPINION NO.: 77-037

December 28, 1977

Honorable William J. O'Rourke
Secretary
Department of Public Safety
P. O. Box 818
Dover, Delaware 19901

QUESTION: Is the Department of Public Safety required to allow a bidder to a contract to inspect the bids submitted by the other vendors bidding on the contract?

ANSWER: Yes. Bid submissions are open for public inspection including inspection by other bidders to the contract, unless information contained therein is exempted from public disclosure by the "Sunshine Law", 29 Del. C. Ch. 100. If such information is exempted from public disclosure it should be deleted but the rest of the information must be opened to inspection.

DISCUSSION:

The facts surrounding this request are that the Department of Public Safety advertised for bids on a communications processor. After the award of the contract was made, one of the unsuccessful bidders requested that he be allowed to inspect the bid packages submitted by the other bidders. The question raised is whether the Department must allow such inspection.

Bidding of contracts in Delaware is controlled by 29 Del. C. Ch. 69. Opening bids is controlled by 29 Del. C. §6907 which provides, in part:

The bid shall be publicly opened at the time and place specified.....

Since the phrase "publicly opened" is not defined in Chapter 69 or elsewhere in the Delaware Code, it must be read in context and defined according to common and approved usage unless it has gained a peculiar meaning in law. 1 Del. C. §303; E. L. duPont de Nemours & Co. v. Clark, Del. Ch., 85 A. 2d 721 (1952). The verb "open" is defined in Black's Law Dictionary, Revised Fourth Edition, as follows:

To render accessible, visible or available; to submit or subject to examination, inquiry, or review, by the removal of restrictions or impediments. The adverb "publicly" is defined in Webster's Seventh New Collegiate Dictionary as follows:

1. In a public manner; OPENLY
- 2a. By the public generally, 2b. By the "government".

Therefore, the clear and plain meaning of the phrase "publicly opened" as contained in 29 Del. C. §6907 is that the General Assembly intended that the bids should be opened under the public eye.

This is consistent with the primary purpose of bidding statutes. As stated by the Delaware Supreme Court in Delaware Technical and Community College v. C & D Contractors, Inc., Del. Supr., 338 A. 2d 568 (1975);

The primary purpose of statutes governing bidding on public works is to protect funds. Fetters v. Mayor & Council of Wilmington, 31 Del. Ch. 319, 72 A. 2d 626 (1950); W. Paynter Sharp & Sons, Inc. v. Heller, Del. Ch., 280 A. 2d 748 (1971).

Any question involving the disclosure of documents in the possession of a state agency must be considered in light of the State's Freedom of Information Act (known as the "Sunshine Law"), and thus whether that act requires disclosure of bidding material. [FNA] Section 10001 of Title 29 states the purpose of the Sunshine Law:

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Del. Op. Atty. Gen. 77-037, 1977 WL 24790 (Del.A.G.)

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(Cite as: Del. Op. Atty. Gen. 77-037, 1977 WL 24790 (Del.A.G.))

It is vital in a democratic society that the public business be performed in an open and public manner so that the citizens shall be advised of the performance of public officials and of the decisions that are made by such officials, in formulating and executing public policy. Toward this end, this Act is adopted, and shall be construed.

Twenty-nine Del. C. §10003 requires that "public records" be opened to inspection and copying by any citizen of the State of Delaware. The definition of "public record" contained in 29 Del. C. §10002 states:

"Public record" is written or recorded information made or received by a public body relating to public business. For purposes of this Act, the following records shall not be deemed public). 'Therefore, since the bid documents which are the subject of this opinion are written information "received by a public body relating to public business" they are subject to inspection under the Sunshine Act unless they fall within one of the exceptions set out in 29 Del. C. §10002. The only exemption which need be discussed in considering this question protects from disclosure under the Act, "Trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature."

A trade secret is described in the Restatement of Torts, §757, Comment B, as follows:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. See also Space Aero Products Co., Inc., et al. v. R. E. Darling Company, Inc., 208 A. 2d 74 (Md. App. 1955).

The Court in Space Aero Products Co., Inc., et al. v. R. E. Darling Company, Inc., supra, listed some of the factors which must be considered in determining whether information is a trade secret.

These factors are:

1. the extent to which the information is known outside of his business;
2. the extent to which it is known by employees and others involved in his business;
3. the extent of measures taken by him to guard the secrecy of the information;
4. the value of the information to him and to his competitors;
5. the amount of effort or money expended by him in developing the information;
6. the ease or difficulty with which the information could properly be acquired or duplicated by others.

It is, however, a factual question as to whether something constitutes a trade secret. In conjunction with the factors listed above it must be remembered that limited publication of a trade secret may not destroy the owners' right in that trade secret. Absolute secrecy is not required. Data General Corporation v. Digital Computer Controls, Inc., Del. Supr., 297 A. 2d 437 (1972); Data General Corporation v. Digital Computer, Inc., Del. Ch., A. 2d 105 (1975).

The second part of the exception listed in 29 Del. C. §10002(2) is "commercial or financial information obtained from a person which is of a privileged or confidential nature". This type of information, like trade secrets, must be unique information not known to the industry or the public in general which would give a competitor an advantage. This would not include matters of substance relating to the product or services bid on, such as the quoted price or information relating to the product which was not a trade secret, etc. It would include information which may have been required to be submitted in order that the agency could evaluate the company but which, if released, would greatly harm the company and might be used by a competitor.

More specifically, in discussing what is exempted from public disclosure as commercial or financial information under 5 USC §552(b)(4), which provision is very similar to 29 Del. C. §10002(2), the Court of Appeals in National Parks and Conservation Association v. Morton, 498 F.2d 763 (D.C. Cir., 1974) held:

"To summarize, commercial or financial

Del. Op. Atty. Gen. 77-037, 1977 WL 24790 (DeLA.G.)

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(Cite as: Del. Op. Atty. Gen. 77-037, 1977 WL 24790 (DeLA.G.))

matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."See also Petkas v. Staats, 501 F. 2d 887 (D.C. Cir., 1974).

(DeLA.G.)
END OF DOCUMENT

Since the authority cited above clearly indicates that there must be a factual determination made on a case by case basis, it is suggested that someone with knowledge and expertise in the field review the documents to determine whether particular information within any of the bid documents constitute trade secrets or commercial or financial information. It should also be pointed out that simply because the document contains certain privileged information it does not mean the entire document can be withheld. Those portions that are exempt from disclosure should be deleted and the rest of the documents opened for inspection. In addition, an equally troublesome question is whether or not bid documents may pertain to pending or potential litigation and thus not disclosable to the public under 29 Del. C. § 10002(d)(9). Since each bid question potentially involves litigation, our Office should be consulted on each bid document request to determine if the circumstances warrant non-disclosure under section 10002(d).

If you have further questions concerning this matter, please feel free to contact me.
Very truly yours,
Malcolm S. Cobin
Assistant Attorney General

APPROVED BY:

RICHARD R. WIER, JR.
ATTORNEY GENERAL

[FNa]

. See also Attorney General's Opinion 77-029 which deals with disclosure of documents.

Del. Op. Atty. Gen. 77-037, 1977 WL 24790

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00IB15 - DELAWARE STATE HOUSING AUTHORITY APPLICATION PROCEDURES

October 4, 2000

New Castle County/Civil Division

The Honorable David P. Sokola
24 Beech Hill Drive
Newark, DE 19711

The Honorable Roger P. Roy
3 Citation Court
Wilmington, DE 19808

RE: Delaware State Housing Authority Application Procedures

Dear Senator Sokola and Representative Roy:

On August 1, 2000 Representative Roy requested a legal opinion from the Department of Justice concerning the Delaware State Housing Authority's decision to deny access to a project market study for the Cynwyd Club apartments. On August 4, 2000 Senator Sokola submitted a similar request to the Department of Justice. In each of your letters, you also noted that the Delaware State Housing Authority ("DSHA") took action on the various applications for the project and you questioned whether such action was valid if the market studies were not public and should have been.

On or about August 10, 2000, DSHA, after review, made the market study for the Cynwyd apartment project available to both of you without restriction. Subsequently, on September 25, 2000, DSHA notified both of you that, in future applications for housing credits, "the market study submitted as part of the application will be made available to the public, upon request, once all of the applications are submitted." While that decision moots the first question you posed, your discussion on this subject with our office has placed the question of public accessibility in a broader context, namely, the extent to which all documents submitted by an applicant are publicly accessible.

The starting point for such an analysis is 29 Del. C. § 10002(d) which defines public record as: information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.

Clearly, the application, and any documentation submitted by an applicant in support of the application, falls within the definition of a public record. However, Section 10002(d) provides fourteen exceptions to the definition of public documents including subsection (2) which states that "[T]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature"

shall not be deemed public. One of the significant concerns for DSHA is the fact that the funding cycle is a several step process that takes the better part of a year from start to finish. The applicants are required to submit significant amounts of financial information not only about the applicant itself but the cost formulas that will be used to determine the cost of the project and the amount of money or tax credit sought from the DSHA. In circumstances where there is more than one applicant for a particular project, the process can be quite competitive and certain aspects of the information submitted in the application, if made public prior to the final approval of the grant, could result in the disclosure of commercial or financial information which is privileged or confidential.

Under Delaware law, a trade secret is "confidential and proprietary information" which, if it "falls into a rival's hands", will cause "serious competitive disadvantage." ID Biomedical Corp. v. TM Technologies, Inc., Del. Supr., 1994 WL 384805, at p. 4 (July 20, 1994). "Faced with objections based on trade secret or proprietary information, courts have applied tests that look first to whether the information sought is indeed a trade secret and whether disclosure of such information will be harmful to the objecting party." MacLane Gas Co. v. Enserch Corp., Del. Ch., 1989 WL 104931, at p. 2 (Sept. 11, 1989) (Chandler, V.C.). The fact that two or more entities may be in competition for a tax credit does not necessarily cloak their submission with the protection afforded by this section of FOIA. Stated another way, it is the information, not the process which is subject to the FOIA exception.

In Opinion 77-029 (Sept. 27, 1977), this Office relied on cases under the federal FOIA trade secrets exception, which "uses language nearly identical to Delaware's Sunshine Law." Id. Commercial or financial information "is confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." Id. (quoting National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted). See also United Technologies Corp. v. Department of Health & Human Services, 574 F. Supp. 86, 89 (D. Del. 1983).

Trade secrets "consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives an individual or business an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers." Opinion 77-029 (Sept. 27, 1977) (quoting Restatement of Torts Section 757, comment b). The factors in determining whether information is a trade secret are: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended developing the information; and (6) the ease or difficulty with which the information could properly be acquired or duplicated by others. Opinion 77-029 (citing Space Aero Products, Inc. v. R.E. Darling Co., Md. App., 208 A.2d 74 (1965)).

In Opinion 87-1031 (Nov. 4, 1987), this Office determined that personal financial statements filed by licensees with the Alcoholic Beverage Control Commission contained confidential information and were not disclosable under FOIA. The exemption for confidential financial information was intended "broadly to protect individuals from a wide range of embarrassing disclosures." Id. (quoting Gregory v. FDIC, 470 F. Supp. 1329, 1334 (D.D.C. 1979), rev'd in part on other grounds, 631 F.2d 896 (D.C. Cir. 1980)). "The release of information regarding one's assets, profits and losses, stock holdings, loans and collateral" are confidential financial information. Opinion 87-1031.

The trade secrets exception comes up often in public contracts, when a losing bidder asks to see the proposal submitted by the winning bidder, as well as documents evidencing how the agency decided to award the contract. As a general rule, responses to a government agency's request for proposal "are

public records subject to the provisions of the Freedom of Information Act." Computer Co. v. Division of Health & Social Services, Del. Ch., 1989 WL 108427, at p. 3 (Sept. 19, 1989) (Hartnett, V.C.). See Opinion 77-037 (Dec. 28, 1977) (bid packages are information "received by a public body" and therefore subject to FOIA, unless they contain trade secrets or confidential or privileged information, in which case they may be redacted).

In Hecht v. Agency for International Development, C.A. No. 85-263-SLR (D. Del., Dec. 8, 1996), federal contractors argued that information they submitted to the federal government was exempt from disclosure as trade secrets. The contractors sought to prevent disclosure of employee resumes, claiming that would open the door to recruitment by competitors. The federal district court found that "[t]he possibility of another company recruiting away one's employees is present in nearly every industry, . . . [and] [t]he possibility that contractors would suffer substantial harm in this manner resulting from the disclosure of their employees' biographical data appears remote." Slip. op. at 19. The contractors also sought to prevent disclosure of indirect cost rates (fringe benefits, overhead, and general and administrative costs). Although the unit prices charged to the government were not exempt from disclosure, the district court concluded that disclosure of the contractor's profit multiplier could result in an unfair competitive advantage, by enabling competing contractors "to accurately calculate [the contractor's] future bids and its pricing structure" Slip op. at 22 (quoting Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979)). The district court also held that information in bid proposals regarding the contractor's technical approaches need not be disclosed, because it contained details about the contractors' processes, operations, and style of work.

Accordingly, DSHA must, similar to other state agencies, work from the premise that any application and supporting documentation is presumed open to the public unless it falls within one of the Section 10002(d) exceptions of being deemed a "trade secret" or of being characterized as information of a "privileged or confidential nature." If an applicant marks a document as confidential or trade secret, the agency is not bound by that claim but is required to make its own independent determination whether the document in fact meets the statutory test of being a trade secret or confidential financial information.

The second issue raised by your inquiry was whether the failure to produce the market study invalidated any action taken by the Council on Housing (the "Council") with respect to the applications. Traditionally, the only relief when there is a denial of access to public documents is a finding by our office or a ruling by an appropriate court that the agency will be required to make public a document previously withheld from public access. The only cure for a denial of access is the availability of access.

Actions taken by a public body in a public meeting are subject to the provisions of 29 Del. C. § 10004 relating to open meetings. The purpose of § 10004 is to assure that the business of the public body is conducted in the open and that the public be fairly informed in advance of the subject(s) to be considered at the meeting. In the context of actions taken by the Council on the Cynwyd apartment project, there is no allegation nor basis to conclude that any of the provisions of Section 10004 were violated. Accordingly, it is our conclusion that the Council's action in conducting its consideration and action on the application through July 31, 2000 were in conformity with Section 10004 and not subject to any remedial action under 29 Del. C. § 10005.

Please feel free to contact me if you have any further questions.

Very truly yours,

Michael J. Rich
State Solicitor

cc: The Honorable M. Jane Brady
Susan A. Frank, Housing Director
Dennis Spivack, Esquire

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Del. Op. Atty. Gen. 77-029, 1977 WL 24783
(DeLA.G.)Office of The Attorney General
State of Delaware
OPINION NO.: 77-029

September 27, 1977

Honorable James H. Gilliam, Jr.
Secretary
Department of Community Affairs and Economic
Development

QUESTION: Which records of the Division of Economic Development relating to applications by businesses for loans in the form of Industrial Revenue Bonds may be disclosed to the public pursuant to the Delaware Sunshine Law?

ANSWER: Records which do not contain information specified in the exemptions enumerated in 29 Del. C. §10002(d) defined herein may be disclosed to the public.

DISCUSSION:

You have asked which records of the Division of Economic Development relating to applications for loans in the form of Industrial Revenue Bonds may be disclosed to the public pursuant to the Delaware Sunshine Law, 29 Del. C. Ch. 100. You have indicated that the project files containing the loan applications include such information as manufacturing procedures, financial statements, and audit reports.

Public access to records in the custody of state agencies is provided for in 29 Del. C. §10003.

(a) All public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate

public body. (Emphasis added.)

"Public records" is defined in 29 Del. C. § 10002(d) to include any "written or recorded information made or received by a public body relating to public business." However, specifically excluded under 29 Del. C. §10002(d) from this broad definition are records which are "trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature."

The question of what records are trade secrets, confidential or privileged commercial or financial information within the meaning of the Delaware Sunshine Law is a question of first impression in Delaware.

In construing a statute of uncertain meaning, rules of statutory construction permit reference to other legislative enactments which pertain to the same matters and which employ similar language. Special consideration may be given to similar legislative enactments to determine the general policy and objective of a statute. See 2A C. Dallas Sands, *Statutes and Statutory Construction*, § 52.03 at 337, 338, (4th ed. 1973).

The Federal Freedom of Information Act at U.S.C.A. §552(b) (4) uses language nearly identical to Delaware's Sunshine Law in creating an exception to records that may be available for public inspection. Section 552(b) (4) provides specifically that:

(b) This section does not apply to matters that are--

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential....

In construing 5 U.S.C.A. §552(b) (4), the Federal Court of the District of Columbia has defined "confidential" to mean information "which would not customarily be released to the public by the person from whom it was obtained." *National Parks and Conservation Ass'n v. Morton*, 351 F.

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Supp. 404, 402 (D. D.C. 1972). In upholding the District Court's definition, the District of Columbia Court of Appeals expanded on the definition of "confidential" by stating:

...commercial or financial matter is "confidential" for purposes of exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks and Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) p. 770 (Emphasis added).

Like "confidential", the term "privileged" is undefined by the Federal Freedom of Information Act. However, "privileged" has been judicially construed to refer to "privileged communications" between an attorney and client; a husband and wife; a priest and parishioner; and a physician and patient. The non-disclosure of such privileged communications is grounded on the need for absolute candor between persons having such a special relationship. [FNAI] See 33A Words and Phrases, Privileged Communication 530-543 (1971).

The terms "commercial" and "financial" are also undefined by the Federal Freedom of Information Act. However, both terms have been given broad definitions by the courts. "Commerce" has been defined as any matter pertaining to the "transportation of commodities and consists of dealing in commercial products, involving the purchase, sale, or exchange of merchandise..." See 7A Words and Phrases, Commerce 454-461 (1971).

The term "financial" has been simply defined as "any dealing in money." See 16A Words and Phrases, Financial 711 (1971).

The term "trade secret" has been defined more precisely. Restatement of Torts §757, comment b provides that:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical

compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

In addition, the Court in Space Aero Products, Inc., et al. v. R. E. Darling Company, Inc., 208 A.2d 74 (MD. App. 1955) listed some of the factors which must be considered in determining whether information is a trade secret. These factors are:

1. the extent to which the information is known outside of his business;
2. the extent to which it is known by employees and others involved in his business;
3. the extent of measures taken by him to guard the secrecy of the information;
4. the value of the information to him and to his competitors;
5. the amount of effort or money expended by him in developing the information;
6. the ease or difficulty with which the information could properly be acquired or duplicated by others.

Employing the aforementioned definitions, the custodian of the records relating to loan applications located in the offices of the Department of Community Affairs and Economic Development will have to make a document by document determination as to whether a document falls into a section 10002(d) exemption.

In making such a factual determination, the custodian should ask the following questions about each requested record:

1. Does the requested record contain "confidential commercial" information as these terms are defined herein?
2. Does the requested record contain "privileged commercial" information as these terms are defined herein?
3. Does the requested record contain "confidential financial" information as these terms are defined herein?
4. Does the requested record contain "privileged financial" information as these terms are defined herein?
5. Does the requested record contain "trade secret" information as that term is defined herein?

If the answer to any of the five questions is in the

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affirmative, the record should be withheld from disclosure. It should be noted that the five exempt categories are not the only categories under 29 Del. C. §10002(d) that may require non-disclosure. They are merely the most common type of exempt categories the Department will have in its possession. Section 10001(d) enumerates nine other possible categories of documents [FNa2] exempt from public inspection.

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(Del.A.G.)
END OF DOCUMENT

In determining which records can be disclosed and which records must be withheld, it will become apparent that some files or documents contain both exempt and non-exempt information. In such instances, exempt information should be segregated and the non-exempt information made available for public inspection.

As questions arise in applying this Opinion, please do not hesitate to call our Office for further advice. See also Opinion of the Attorney General, Request No. 3W-075.

Very truly yours,
Wheeler K. Neff
Deputy Attorney General

APPROVED BY:

Richard R. Wier, Jr.
Attorney General

[FNa1]

. Various statutory and common law restrictions exist which would prohibit disclosure of matters pertaining to these special relationships pursuant to 29 Del. C. §10002 (d) (6).

[FNa2]

. 1) Personnel, medical or pupil files; 2) Investigatory files for criminal or civil law enforcement purposes including presentence reports; 3) Criminal files and criminal records constituting an invasion of privacy; 4) Law enforcement intelligence files; 5) Records specifically exempted by law; 6) Records of anonymous charitable contributors; 7) Labor negotiation records; 8) Records pertaining to pending or potential litigation; 9) Records of discussions held during §10004(b) Executive Sessions.

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Hecht v. U.S. Agency for Intern.
Development D.Del., 1996. Only the Westlaw
citation is currently available.

United States District Court, D. Delaware.

James L. HECHT, Plaintiff,

v.

UNITED STATES AGENCY FOR
INTERNATIONAL DEVELOPMENT, Defendant.

No. Civ.A. 95-263-SLR.

Dec. 18, 1996.

Allen M. Terrell, Jr., Frederick L. Cottrell, III, and
Richard I.G. Jones, Jr., of Richards, Layton &
Finger, Wilmington, Delaware, Charles B. Hecht, of
Nichols & Hecht, Denver, Colorado, for plaintiff, of
counsel.

Gregory M. Sleet, United States Attorney, and
Paulette K. Nash, Assistant United States Attorney,
for defendant.

MEMORANDUM OPINION
ROBINSON, J.

I. INTRODUCTION

*1 Plaintiff James L. Hecht filed this suit on April 28, 1995, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 522. He claims that defendant, the United States Agency for International Development ("USAID") improperly withheld documents concerning a contract awarded by defendant for energy conservation work in the former Soviet Union. He seeks an order compelling defendant to produce the withheld documents and an award of attorney fees. (D.I.1) Before the court are the parties' cross-motions for summary judgment. (D.I.8, 12) The issues have been fully briefed, and as there are no disputed issues of material fact, this is an appropriate case for summary judgment. For the reasons that follow, the court will grant in part and deny in part both

motions.

II. BACKGROUND

*1 Plaintiff is a political science professor who has focused his studies on the ways in which the United States government and private American businesses may assist the former Soviet republics, or "Newly Independent States" ("NIS"), in their transition to a market economy. (D.I. 9 at 2) USAID is a U.S. government agency involved in the distribution of foreign aid. On March 11, 1993, plaintiff contacted USAID and made a formal request, pursuant to FOIA, for documents pertaining to Component 1 of Project 110-0002 (the "project"). The purpose of the project was to provide energy conservation work for the NIS. Specifically, plaintiff requested all Requests for Proposals ("RFPs") soliciting bids for the project, "all internal documents of any kind .. . addressing or concerning the decision of [US]AID to make the solicitation ...," all internal documents concerning the selection of parties from whom bids would be solicited, a list of solicitees, all documents submitted by the successful bidder, USAID's evaluation of the solicitations submitted, the contracts that USAID awarded, and all progress reports on the project. (D.I. 9 at Ex 1)

*1 On March 24, 1993, defendant notified plaintiff that it had received his request and would initiate a search of its files. (D.I. 14 at B28a) In accordance with USAID's regulations concerning FOIA requests, defendant notified the three companies from which it had solicited bids and to which it had awarded contracts of plaintiff's request. (D.I. 14 at B28c-e) The letters requested that the companies inform USAID of any "business, confidential or proprietary information you would like withheld." (D.I. 14 at B28c-e) All three companies responded, requesting that USAID not disclose information about their proposed personnel. Two of the companies also asked that USAID withhold the portions of their proposals pertaining to their

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technical approaches to the project. (D.I. 14 at B28f-j) A document entitled "Freedom of Information Action Control Record," submitted by defendant, indicates that as of April 12, 1993, USAID had reviewed 819 pages of documents, 583 of which were released to plaintiff. Of the 284 pages that were withheld, 201 were resumes of proposed personnel. (D.I. 14 at B28k-l) According to the affidavit of Bruce Gatti, former Chief of Customer Outreach and Oversight Services ("COOS") at USAID, a total of 1,174 pages of documents were eventually reviewed in connection with plaintiff's request. Of these, 580 pages were released and 594 withheld. Of the withheld pages, 229 were resumes; the remaining portions of the proposals and contracts withheld contained information on contractors' fringe benefits, overhead, general and administrative costs ("G & A"), and other "commercial, financial, and personnel information." (D.I. 14 at B20-B21) Mr. Gatti was unable to explain USAID's failure to produce other documents that plaintiff had requested:

*2 The FOIA office does not have a complete listing of the documents that were withheld from Mr. Hecht with respect to his March 1993 request. Most of the documents that were withheld were stored on a shelf in the old FOIA office. At that time, the FOIA office did not prepare listings of all withheld documents. I do not know what happened to the documents that were withheld from Mr. Hecht, but suspect that they were destroyed when the office moved in June 1994. As best I can determine, the FOIA office does have copies of all procurement documents that were withheld from Mr. Hecht. It appears that most of the missing documents were progress reports, analysis, etc. sent to the FOIA office by the ENI Bureau.

*2 (D.I. 14 at B22)

*2 The released documents were forwarded to plaintiff on June 1, 1993 along with a cover letter explaining that documents containing trade secrets, other proprietary business information, or personnel data had been withheld. The letter also explained, in a one-sentence statement, why USAID had chosen the three companies that received RFPs. (D.I. 9 at Ex.2)

*2 On July 28, 1993, plaintiff appealed defendant's decision to withhold the resumes of the contractors' personnel. Plaintiff also claimed that defendant had simply failed, without explanation, to produce much of the information he had requested, in particular 1) documentation of USAID's decision to undertake the project and to solicit bids from certain companies; 2) records relating to "the nature of the work the contractors were to perform," and 3) evaluation plans and progress reports. (D.I. 9 at Ex. 3)

*2 On September 13, 1993 plaintiff sent a followup letter noting that defendant had not responded to his appeal within twenty days as required by law. He urged defendant to reply to his request as soon as possible. (D.I. 9 at Ex. 4) As of January 1994, still having received no response from defendant, plaintiff sent another letter.^{FN1} (D.I. 9 at Ex. 5)

FN1. According to Mr. Gatti, "there is no record in the files indicating that either [followup letter] was received." (D.I. 14 at B23) Given the apparent state of defendant's recordkeeping, the court will assume that USAID did receive plaintiff's letters.

*2 Internal memoranda submitted by defendant suggest that from June through August of 1994 some effort was made to follow up on plaintiff's appeal. (D.I. 14 at B28y-ee) It is not clear, however, how serious this effort was. One communication expressed frustration over the "time consuming" nature of plaintiff's request. (D.I. 14 at B28bb) Another questioned "how much USG time must be spent on such requests from this person ..." (D.I. 14 at B28y) In any event, there is no indication that the matter was resolved, and by December 1994, nearly a year and a half after plaintiff's appeal, defendant had not yet responded.^{FN2} (D.I. 9 at Ex. 6)

FN2. Defendant states, in an affidavit submitted by Willette Smith, a public affairs specialist in the COOS Office of Administrative Services, that processing of FOIA requests was suspended for about

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one and a half weeks during June 1994, when USAID moved its offices. Defendant also cites staff downsizing as a factor contributing to delays. (D.I. 14 at B50, B52)

*2 On December 20, 1994, plaintiff submitted a second FOIA request to USAID. This request involved documents pertaining to a separate energy conservation contract awarded by USAID to RCG/Hagler Bailly, Inc. ("Hagler Bailly"). (D.I. 9 at Ex. 7) Defendant acknowledged receipt of plaintiff's request on January 19, 1995.^{FN3} (D.I. 9 at Ex. 8) As with plaintiff's previous request, defendant contacted the contractor, and again the contractor requested that certain information be withheld. (D.I. 14 at B28mm-pp) There is no record, however, of defendant having released any documents responsive to plaintiff's request prior to the filing of this lawsuit.

FN3. Mr. Gatti states that the holiday season prevented USAID from acknowledging plaintiff's request within the ten days allotted by USAID regulations. (D.I. 14 at B23)

*3 On April 28, 1995, having received nothing further from defendant, ^{FN4} plaintiff filed the instant suit. Approximately a month after plaintiff filed his complaint, Joanne Paskar, a COOS program analyst, was assigned the task of responding to plaintiff's appeal and second FOIA request. (D.I. 14 at B40) In June of 1995, defendant offered to produce, within 40 days, 1) all nonexempt documents responsive to plaintiff's first and second FOIA requests; 2) a list and description of documents which defendant claimed were exempt from disclosure; and 3) the basis of each claimed exemption, "in detail sufficient to allow [plaintiff] and a reviewing court to determine if the claim of exemption is warranted." (D.I. 9 at Ex. 9) In exchange for defendant's promise to produce these items, plaintiff consented to an extension of time for defendant to file an answer to the complaint. (D.I. 9 at Ex. 9)

FN4. Defendant claims that Ms. Antoinette Hackett, a former employee of USAID, advised plaintiff of the status of his appeal by telephone in January and February of 1995. (D.I. 14 at B23)

*3 On August 2, 1995, defendant submitted a "partial response" to plaintiff's second FOIA request. Defendant produced a part of the RFP plaintiff requested, but stated that "[t]he remaining portions of the RFP have been misplaced by our Agency's Office of Procurement ." (D.I. 9 at 10) Defendant also stated that it had withheld, in their entirety, documents submitted by Hagler Bailly entitled "Cost Proposal" and "Best and Final Offer" because these documents contained "confidential commercial/financial and personal information on the submitter's employees." No further description of these documents or explanation for withholding them was offered at that time. Defendant also stated that it had not yet reached a decision on whether to release Hagler Bailly's technical proposal. With respect to the requested documentation of the evaluation and selection of proposals, defendant stated that the sole document it had located-a report by the Technical Evaluation Panel to the contracting officer-had been withheld. Defendant explained that "[t]he release of this document could reasonably be expected to cause foreseeable harm to our agency's deliberative and decision-making processes by inhibiting employee participation in future Technical Evaluation Panels and by stifling open and frank communications by Panel members." (D.I. 9 at Ex. 10) Finally, defendant released portions of the contracts themselves, with the exception of those portions containing "[c]onfidential commercial/financial information." (D.I. 9 at Ex. 10) Defendant did not elaborate on the nature of the information contained in these contracts.^{FN5}

FN5. Plaintiff, in his affidavit, asserts that the redacted portions of the contract contained G & A and overhead costs and personnel data. (D.I. 9 at Ex. A)

*3 Defendant submitted a "second partial response" to plaintiff's request the following day. With that

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response, defendant provided the previously missing portions of the RFP. (D.I. 9 at Ex. 11) On August 23, 1995, defendant provided an "additional partial response" in which it released portions of the technical proposal. Portions of the proposal "identifying and containing personal information on Hagler, Bailly's personnel" and those "containing implementation, managerial, and operational approaches" were withheld at Hagler Bailly's request. With respect to plaintiff's request for internal USAID documents relating to the preparation of the RFP, defendant asked for clarification.^{FN6} Defendant also notified plaintiff of the existence of another report from the Technical Evaluation Panel, but stated that it had been withheld under the "Deliberative Process Privilege." (D.I. 9 at Ex. 12)

FN6. In his affidavit, Mr. Gatti explained that several interpretations of plaintiff's request for internal USAID documents relating to the preparation of the RFP were possible. According to Mr. Gatti, plaintiff never responded to defendant's request for clarification. (D.I. 14 at B27)

*4 In October 1995, defendant finally responded to plaintiff's July 28, 1993 appeal. In a letter to the Assistant United States Attorney representing defendant, USAID's appeals officer explained the agency's decision to continue withholding the resumes of the contractors' employees:

*4 Release of the resumes would disclose information on the qualifications and makeup of the contractor[s'] workforce. This disclosure could lead to a likelihood of substantial competitive injury. The disclosure also would constitute a clearly unwarranted invasion on the personal privacy of the contractor[s'] employees.

*4 (D.I. 9 at Ex. 14) As to the G & A and other financial information withheld, the appeals officer stated that "[t]he disclosure of said information could lead to the likelihood of substantial competitive injury to the submitter." (D.I. 9 at Ex. 14) Along with the appeal letter, defendant released a "special evaluation" on the district heating project. However, in response to plaintiff's request

for evaluation plans, the appeals officer stated that "[t]hose evaluation plans were not produced." (D.I. 9 at Ex. 14)

*4 In the course of preparing its response to plaintiff's appeal, defendant located additional documents which had not been evaluated or released earlier. Defendant, therefore, sent an auxiliary response along with the notification from the appeal officer. In the auxiliary response, defendant provided a brief description of each newly discovered document. If the document had been withheld, the description concluded with a citation to the claimed FOIA exemption, but did not provide any further explanation.^{FN7} Of the newly discovered documents, USAID released 36 pages of a draft technical proposal, with deletions, 109 pages of USAID documents relating to the proposals, and 120 pages relating to the selection procedures. Some 525 pages were withheld. (D.I. 9 at Ex. 13) In addition, defendant provided a list of 62 documents relating to contractor evaluation and asked plaintiff to select items from the list that he wished to receive. (D.I. 9 at Ex. 13, 15) Of this list, plaintiff requested and received 8 documents. (D.I. 14 at B28)

FN7. For example, documents 1 and 8 were listed as follows:

1. Cost/business Management Proposal: Proposal for the Energy Efficiency and Market Reform Project in Russia, RCG/Hagler, Bailly, February 19, 1992, 241 pages. [Withheld: (b)(4) and (b)(6)]

....
8. Fax: Bob Delemarre, International Resources Group, to Angela McNernet, USAID, re established budget, February 14, 1992, 7 pages. [Withheld: (b)(4)]
(D.I. 9 at Ex. 13)

III. DISCUSSION

*4 Plaintiff has moved for partial summary judgment. Specifically, he seeks an order 1) requiring defendant "to produce ... all non-privileged documents sought by [plaintiff's] two requests;" 2) requiring defendant to produce an

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index describing in detail each document withheld and USAID's reasons for withholding them; and 3) awarding plaintiff attorney fees and costs in an amount to be subsequently determined. (D.I.8) Defendant has filed a cross-motion for summary judgment. (D.I.12)

A. Summary Judgment Standard

*4 Federal Rule of Civil Procedure 56(c) provides that a party is entitled to a summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." A party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. Where, as here, the nonmoving party opposing summary judgment has the burden of proof at trial on the issue for which summary judgment is sought, he must then make a showing sufficient to establish the existence of an element essential to his case. If the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Moreover, the mere existence of some evidence in support of the nonmoving party will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to enable a jury to reasonably find for the nonmoving party on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

*5 In a FOIA case, a court may grant summary judgment in favor of the defendant when the agency establishes, through affidavits, that it has discharged its obligations under the statute. Such affidavits must

*5 describe the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection

between the information and the claimed exemption ... and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.

*5 *American Friends Serv. Comm. v. Dep't of Defense*, 831 F.2d 441, 444 (3d Cir.1987).

B. Freedom of Information Act

*5 The FOIA requires government agencies to make their records available to members of the public upon request. 5 U.S.C. § 552. Agencies are required to promptly furnish requested records unless one of nine specific exemptions applies. 5 U.S.C. § 552(b). In furtherance of FOIA's purpose, "to facilitate public access to Government documents," *United States Dep't of State v. Ray*, 502 U.S. 164, 173 (1991), and to "ensure an informed citizenry, vital to the functioning of a democratic society," *FBI v. Abramson*, 456 U.S. 615, 621 (1982), the court must begin with a strong presumption in favor of disclosure. *United States Dep't of State v. Ray*, 502 U.S. at 173; *Davin v. United States Dep't of Justice*, 60 F.3d 1043, 1049 (3d Cir.1995). The agency's decision on whether to withhold documents is not entitled to deference, but must be reviewed *de novo* by the court. *Id.* Where records have been withheld, the defendant agency has the burden of demonstrating that one of the nine exemptions applies. *Id.*; *Manna v. United States Dep't of Justice*, 51 F.3d 1158, 1163 (3d Cir.), *cert. denied*, 116 S.Ct. 477 (1995). These exemptions are to be construed in keeping with the "liberal congressional purpose" of FOIA, yet not so narrowly as to deprive the exemptions of "meaningful reach and application." *Id.*, quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). In cases where one or more exemptions do apply, the defendant agency is under an obligation to release "any reasonably segregable portion" of the record in question. 5 U.S.C. § 552(b) ; see also *Davin v. United States Dep't of Justice*, 60 F.3d at 1049.

*5 In the instant case, defendant has relied upon three of the enumerated exemptions in withholding documents. Exemption 4 protects from disclosure "

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trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Exemption 5 shields "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

*6 Plaintiff argues that the withheld materials do not meet the requirements of exemptions 4 or 6. With respect to the materials withheld under exemption 5, and to some degree with respect to all of the materials, plaintiff contends that he does not have sufficient information about the withheld documents to argue meaningfully for their release.

C. *Vaughn* Index

*6 Plaintiff contends that, because the documents in question are under the sole control and possession of defendant, the court should order defendant to produce a *Vaughn* index. The purpose of such an index is to provide enough information about the withheld documents and the agency's reasons for nondisclosure to permit plaintiff to argue meaningfully for disclosure, and for the court to evaluate such arguments. *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973), *cert. denied*, 415 U.S. 977 (1974); *Davin v. United States Dep't of Justice*, 60 F.3d at 1049-50; *Wiener v. FBI*, 943 F.2d 972, 977-78 (9th Cir.1991), *cert. denied*, 505 U.S. 1212 (1992).

*6 There is no predetermined form or formula for a *Vaughn* index. Affidavits or other materials provided by the defendant agency which describe the withheld documents in some detail and provide reasons for nondisclosure are sufficient. *Davin v. United States Dep't of Justice*, 60 F.3d at 1050. It is not enough, however, for the defendant agency to provide mere generic or categorical descriptions of the material and the reasons for exemption:

*6 A withholding agency must describe each document or portion thereof withheld, and for each

withholding it must discuss the consequences of disclosing the sought-after information.... In *Mead Data Central v. United States Department of the Air Force*, we elaborated on *Vaughn*'s requirements, explaining that the withholding agency must supply "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." ... Categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate.

*6 *King v. United States Dep't of Justice*, 830 F.2d 210, 223-24 (D.C.Cir.1987) (emphasis in original) (citations omitted).

*6 In the present case, defendant has submitted detailed declarations from Bruce Gatti, who oversaw the processing of all FOIA requests received by USAID in the relevant time period, and from Joanne Paskar, who personally handled plaintiff's appeal and second FOIA request after May 1995. These declarations, particularly the latter, provide extensive, detailed information about most of the documents USAID employees reviewed in connection with plaintiff's request. (D.I. 14 at B18-B28, B40-B49) Defendant has also submitted declarations from a director or officer of each of the three contractors about which plaintiff seeks information. These declarations provide detailed analyses of the harm each company would likely suffer were the information in question to be released. (D.I. 14 at B1-B13) In addition, other material in the appendices to both parties' briefs, in particular defendant's August and October 1995 letters to plaintiff, exhaustively describe the documents reviewed by USAID, whether the documents were released, and if not, the reason for the claimed exemption. (D.I. 9 at Ex. 10-15; D.I. 14) The court concludes that, with respect to the documents listed in the Gatti and Paskar declarations, defendant has fulfilled its obligation to provide information on the withheld documents. No additional *Vaughn* index is necessary.

*7 Plaintiff, however, claims that there are additional documents which defendant has not

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produced and for which no exemption is claimed. In addition, Mr. Gatti states in his declaration that the agency did not keep a list of documents withheld from plaintiff's initial FOIA request, and that the documents themselves were presumably destroyed when the office moved. (D.I. 14 at B22) The descriptions of this latter group of documents, and USAID's reasons for withholding them, do not meet the specificity requirement articulated in *Vaughn* and its progeny. In cases where the defendant agency professes not to possess a requested document, "the agency must show it fully discharged its statutory obligations by 'conduct[ing] a search reasonably calculated to uncover all relevant documents.'" *Urban v. United States*, 72 F.3d 94, 95 (8th Cir.1995), quoting *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1351 (D.C.Cir.1983). Defendant has made no such showing. Mr. Gatti's opinion as to the whereabouts of the documents withheld in 1993 is admittedly speculative. Defendant has not made any assertion that it has searched for the missing documents. As to the additional documents whose very existence is in dispute, given the slow, piecemeal approach defendant has taken toward plaintiff's requests from the outset, the court is not satisfied that all relevant documents have been located. The court, therefore, will deny defendant's motion for summary judgment with respect to these documents and order defendant to conduct a proper search.

D. Material Withheld Under Exemption 4

*7 Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In interpreting this language, the D.C. Circuit, in *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765 (D.C.Cir.1974), articulated a two-part test which has been adopted by every other court of appeals that has considered it. See, e.g., *9 to 5 Org. for Women Office Workers v. Board of Governors*, 721 F.2d 1, 7-10 (1st Cir.1983); *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 871 (2d Cir.1978); *Acumenics Research & Tech. v. United States Dep't of Justice*, 843 F.2d 800, 807 (4th Cir.1988); *Sharyland Water*

Supply Corp. v. Block, 755 F.2d 397, 399 (5th Cir.), cert. denied, 471 U.S. 1137 (1985); *General Elec. Co. v. United States Nuclear Regulatory Comm.*, 750 F.2d 1394, 1402-03 (7th Cir.1984); *Pacific Architects & Engineers Inc. v. United States Dep't of State*, 906 F.2d 1345, 1347 (9th Cir.1990); *Anderson v. HHS*, 907 F.2d 936, 946 (10th Cir.1990). Under *National Parks*, material falls under exemption 4 if its disclosure would either 1) interfere with the government's ability to obtain information in the future, or 2) "cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Assoc. v. Morton*, 498 F.2d at 770.

*8 Defendant does not seriously contend that the disclosure of any of the withheld information would impair the agency's ability to obtain information in the future. However, declarations submitted by the contractors attest to their belief that disclosure would cause harm to the companies' respective competitive positions.

*8 Defendant has invoked exemption 4 with respect to the withholding of three categories of information: 1) the resumes of contractors' employees; ^{FN8} 2) information on the contractors' fringe benefits, overhead, and G & A costs; and 3) portions of documents revealing the companies' technical approaches and strategy.^{FN9} The court will address the parties' arguments on each category in turn.

FN8. Plaintiff has attached, as an appendix to his brief, a blank copy of the "Contractor Employee Biographical Data Sheet," a form resume which defendant provided at plaintiff's request. (D.I. 9 at Ex. 17) According to plaintiff, contractors must submit completed forms with their proposals for the employees who will work on the project. (D.I. 9 at Ex. A) For each employee, the form requests a name and address, telephone number, proposed position and salary, marital status, date and place of birth, names and ages of dependents, education and employment

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history, language proficiency, and professional memberships or affiliations. (D.I. 9 at Ex. 17)

FN9. Defendant also contends that the contractors' financial information is protected by the Trade Secrets Act, 18 U.S.C. § 1905. Because the court concludes that this information is protected by exemption 4 of the FOIA, it is not necessary to this argument.

1. Employee Resumes

*8 Defendant contends that the release of biographical information about the contractors' employees would interfere with the contractors' respective competitive positions by opening the door to competitors who wish to recruit away their employees, by providing key clues to their staffing strategy and, through that, their technical approach, and by interfering with their ability to attract qualified personnel. Defendant has not presented to the court any precedent for withholding employee resumes under exemption 4, nor does the court find defendant's arguments with respect to these documents convincing. The possibility of another company recruiting away one's employees is present in nearly every industry, regardless of whether the public is furnished with a list of each company's employees. The possibility that the contractors would suffer substantial harm in this manner resulting from the disclosure of their employees' biographical data appears remote. Similarly, the ability of one company to attract personnel would not appear to be affected as long as all such companies that do business with the government are required to disclose the same information. Finally, to conclude that a competitor could determine, merely by looking at employee resumes, a company's technical and operational approach to a project would require a leap of logic that this court is unwilling to make. The employee resumes, therefore, are not exempt from disclosure under exemption 4.^{FN10}

FN10. The court will consider whether the resumes are protected from disclosure by

exemption 6 in a later section of this opinion.

2. Fringe Benefits, Overhead, and G & A Costs

*8 According to Asif Shaikh, president and chief executive officer of International Resources Group, Ltd., the disclosure of indirect cost rates and structure would enable competitors to:

*8 a. Gain insight into the fringe benefits provided to staff, and therefore to use this information to recruit key staff away from the company.

*8 b. Establish an accurate picture of our likely total costs for a given procurement, since the government's request for proposal typically specifies the main parameters of the direct costs to be incurred....

*8 c. Determine the price of a proposal and allow competition to underbid.

*8 d. Understand the cost constraints under which IRG operates and to thereby devise a cost strategy which maximizes the competitive advantage they gain from this information.

*9 e. Establish an accurate picture of company financial structure, profitability and size.

*9 (D.I. 14 at B2) Similarly, according to David Keith, a director of Hagler Bailly, disclosure of the company's labor category rates would*9 reveal[] sufficient information to permit a competitor to make very useful inferences about Hagler Bailly's underlying costs and profit margins, and thus position themselves accordingly in future competitions. These inferences go to determining how Hagler Bailly develops its prices to potential customers. The rates (including [a] multiplier [which reflects overhead and profit]) were a key determinant in the government's selection process as that process related to costs Both the rates and the [overall] performance strategy are being used extensively today. Public disclosure of this information would make available to competitors valuable insights into the operational strengths of our firm.

*9 (D.I. 14 at B7)

*9 In arguing for disclosure, plaintiff relies on cases where unit price information was held not to fall

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under exemption 4. See, e.g., *Acumenics Research & Technology v. United States Dep't of Justice*, 843 F.2d at 800; *Racal-Milgo Gov't Sys., Inc. v. SBA*, 559 F.Supp. 4 (D.D.C.1981). In each of these cases, as well as in numerous others that have touched on this issue, courts have concluded that the prices charged to the government were not exempt in large part because they did not reveal the contractors' costs. *Acumenics Research & Technology v. United States Dep't of Justice*, 843 F.2d at 802-03, 808; *Gulf & Western Indus., Inc. v. United States*, 615 P.2d 527 (D.C. Cir1979); *Cortex III Service Corp., Inc. v. NASA*, 921 F.Supp. 8, 12-13 (D.D.C.1996); *Racal-Milgo Gov't Sys., Inc. v. SBA*, 559 F.Supp. at 6. See also *Pacific Architects & Engineers Inc. v. United States Dep't of State*, 906 F.2d 1345, 1348 (9th Cir1990) (upholding department's decision that release of unit price information would not cause economic injury to contractor "because of the number of variables that went into determining these rates....").

*9 In *Acumenics*, the contractor argued that if the unit price were disclosed, competitors would be able to calculate the company's profit "multiplier." FN11 In rejecting this argument, the court concluded that "there are too many unascertainable variables in the unit price calculation for a competitor to derive accurately *Acumenics*' multiplier." *Acumenics Research & Technology v. United States Dep't of Justice*, 843 F.2d at 808. Notably, the court did not question the contractor's assertion that the multiplier itself, and by extension the individual variables that were used to calculate it, were exempt from disclosure.

FN11. The multiplier was defined as "the percentage of markup over and above direct costs which a company must charge to cover expenses and achieve its desired profit" and was expressed in the following formula: overhead rate x G & A rate x profit. *Acumenics Research & Technology, Inc. v. United States Dep't of Justice*, 843 F.2d at 802-03.

*9 The court in *Gulf & Western* dealt even more directly with the issue of whether a contractor's

profit rate and costs, in particular G & A, are protected by exemption 4. The court concluded that if such information were released, the contractor's competitors "would be able to accurately calculate [the contractor's] future bids and its pricing structure" *Gulf & Western Indus., Inc. v. United States*, 615 F.2d at 530.

*10 Based on these precedents, the court concludes that defendant has met its burden of showing the likelihood of substantial competitive harm to the contractors resulting from the release of their overhead, G & A, and fringe benefit information. Accordingly, the court will grant summary judgment in favor of defendant with respect to this issue.

3. Technical, Operational, and Managerial Approaches

*10 Defendant argues that the information in the proposals concerning the contractors' technical approaches and similar information should not be disclosed because "they provide strategic knowledge and operational details concerning [the contractors'] 'processes,' 'operations,' and 'style of work.'" (D.I. 14 at B9) As the contractors explained in their declarations:

*10 A manufacturing or software firm often has the advantage of being able to invoke patents or licenses on materials, intellectual property or processes which it holds. However, for a firm such as ours, where the chief capital is intellectual capability, our proprietary processes, operations and styles of work are revealed in proposals.... In consulting practice, a signature or innovative technical approach is an essential element in competitively distinguishing one's firm.

*10 (D.I. 14 at B9) The contractors also illuminated why, despite the fact that the contract has already been awarded, the disclosure of their technical approaches poses an ongoing threat:*10 It would be a mistake to say that since the contract awards have been made, the potential for harm to Hagler Bailly's competitive position caused by release of this information has disappeared. Energy industry privatization and restructuring are long-term

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processes in a highly competitive market. There will be additional business opportunities in these fields.... Exposure of these approaches after award of a particular procurement does not automatically diminish the potentiality for harm, because we re-deploy and adapt them to present and future business opportunities.

*10 (D.I. 14 at B9) Plaintiff counters that information about the contractors' technical, operational, and management approaches is vital to understanding exactly what USAID spent its funds for. If such information is not disclosed, plaintiff argues, the agency will effectively be able to operate in secret-the very situation the FOIA was designed to prevent.

*10 The court acknowledges the importance of the goals that plaintiff seeks to uphold and recognizes that plaintiff's task will be more difficult absent this information. However, the court must balance the public's interest in access to governmental information against the contractors' interest in continuing to operate their businesses. In *Orion Research Inc. v. EPA*, 615 F.2d 551 (1st Cir.), cert. denied, 449 U.S. 833 (1980), the First Circuit encountered a similar issue. In that case, the court concluded that the disclosure of technical proposals would decrease the willingness of contractors to submit forthright proposals to the agency in the future. *Id.* at 554. While the court is not convinced that the disclosure of the information requested in this case would implicate the first prong of the *National Parks* test, it does conclude that the contractors' technical, operational, and managerial approaches are the type of material intended to be protected by exemption 4. Such information is very close, in the court's estimation, to the traditional definition of "trade secrets," which exemption 4 explicitly protects. See also *Racal-Milgo Gov't Sys., Inc. v. SBA*, 559 F.Supp. at 6 (distinguishing unit price information, which it held eligible for disclosure, from, *inter alia*, technical approach data). Therefore, the court will grant defendant's motion for summary judgment with respect to this category of information.^{FN12}

FN12. It is important to note that while the

court has relied on the declarations of Asif Shaikh and David Keith in determining that the financial and technical information should not be disclosed, the court discounts the affidavit submitted by Dr. Wesley Foell, president of Resource Management Associates of Madison, Inc. This latter affidavit, rather than explain how the release of certain types of information would harm the company, merely states the conclusion that several specific documents should not be released because they "would create an economic hardship." (D.I. 14 at B13) This opinion should not be read to indicate that all of the documents listed in Dr. Foell's affidavit are exempt from disclosure. Only the types of information discussed above is protected by the claimed exemption. Defendant is still under an obligation to release any "reasonably segregable" nonexempt information to plaintiff. 5 U.S.C. § 552(b).

E. Material Withheld Under Exemption 5

*11 Exemption 5 protects from disclosure documents that reveal the internal decisionmaking processes of an agency. *Cuccaro v. Secretary of Labor*, 770 F.2d 355, 357 (3d Cir.1985). To qualify for this exemption, a document must reflect predecisional deliberation; a document that merely explains a decision already made does not fall under the exemption. *Id.*; *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C.Cir.1993). Moreover, while advice and recommendations are protected by the exemption, mere factual material is not. *Id.*

*11 Defendant withheld two reports of the Technical Evaluation Panels under exemption 5. Plaintiff, while pointing out in general terms the parameters of the exemption, contends that "[a]bsent a detailed index of the withheld documents as requested ... Dr. Hecht is unable to determine with certainty whether the deliberative process privilege pertains to all or part of the withheld documents." (D.I. 9 at 17-18 n. 7) As discussed fully above, the court concludes that defendant has provided adequate information for the court to

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determine whether exemption 5 applies. According to the declaration of Ms. Paskar, the material withheld under this section

*11 is a report of the Technical Evaluation Panel that reviewed proposals submitted in response to the NIS Energy Institutional Based Services RFP. The report contains the Panel's evaluations and ratings of the submitters and the Panel's recommendations to the Contracting Officer concerning the contractor selection.... The release of this document could reasonably be expected to cause foreseeable harm to our Agency's deliberative and decision-making processes by inhibiting employee participation in future Technical Evaluation Panels and by stifling open and frank communications by Panel Members.

*11 (D.I. 14 at B48) A second report "contains the Panel's evaluations and ratings of the submitters and its recommendations to the Contracting Officer concerning next steps in the contracting strategy for this solicitation." The same reason was offered for this document's nondisclosure. (D.I. 14 at B48) ^{FN13} Based on these descriptions, the court concludes that these documents are pre-decisional and deliberative in nature. Reports by a panel whose function is to evaluate proposals, made as these were before the contractors were selected, appear to be precisely the type of document that exemption 5 was created to protect. Therefore, the court will grant defendant's motion with respect to these two reports.

FN13. Plaintiff apparently did not have access to these descriptions until defendant filed its answering brief. Despite defendant's amplification of its description and explanation for withholding these documents, however, plaintiff did not address the exemption 5 issues in his reply brief.

F. Material Withheld Under Exemption 6

*11 Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exemption applies only where two elements are present. First, the requested

information must be contained in personnel, medical, or similar files. This first element has been construed broadly, and there can be little dispute that the resumes would fall under the category of "similar files." As the Supreme Court noted in *United States Department of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982):

*12 We do not think that Congress meant to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information. Rather, "[t]he exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual.

*12 *Id.* at 602, quoting H.R.Rep. No. 1497, 89th Cong., 2d Sess., 11 (1966), U.S.Code Cong. & Admin. News 1966 at 2428. At least one court has held specifically that employment histories qualify as "similar files" under exemption 6. *Core v. United States Postal Service*, 730 F.2d 946 (4th Cir.1984).

*12 Second, the release of the information requested must "constitute a clearly unwarranted invasion of ... privacy." *United States Department of State v. Washington Post Co.*, 456 U.S. at 602. Whether the release of personal information is "clearly unwarranted" under this standard requires the court to weigh "the public interest served by disclosure against the harm resulting from the invasion of privacy." *International Brotherhood of Elec. Workers Local Union No. 5 v. United States Dep't of Housing and Urban Development*, 852 F.2d 87, 89 (3d Cir.1988). Applying this standard, the Third Circuit has held that the public interest served by the release of nonunion members' names and addresses to unions outweighed those members' privacy interests. *Id.* at 89-90; *United States Dep't of Navy v. Federal Labor Relations Authority*, 840 F.2d 1131, 1136-38 (3d Cir.), cert. dismissed, 488 U.S. 881 (1988). The release of the nonunion members' social security numbers, on the other hand, was held to serve no public purpose and were thus held exempt from disclosure. *International Brotherhood of Elec. Workers Local Union No. 5 v. United States Dep't of Housing and Urban Development*, 852 F.2d at 89.

*12 In the present case, defendant contends that the interest of the contractors' employees in having their

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identity, salary, education and employment history, and other information listed on the biographical data sheets kept private outweighs the interest plaintiff has asserted in letting the public know what the agency is "up to." (D.I. 9 at 26) In this context, the purpose that would be served by releasing the employees' resumes is the original purpose of the FOIA: to shed light on the workings of the government. More specifically, to understand and evaluate the actions of the agency in developing the projects, selecting contractors, and evaluating their work, plaintiff or any other citizen would need to know whether the contractors selected for the projects had hired qualified personnel.

*12 It is true that releasing the biographical data sheets would constitute a substantial invasion of privacy. However, this invasion diminishes if the information required to be released is limited to the qualifications, rather than the identities, of the employees in question. Therefore, the court will order the release of the employee data sheets, but with the names, addresses, and other identifying information redacted.

G. Attorney Fees and Costs

*13 The FOIA permits the court to award reasonable attorney fees and litigation costs "in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E). Because this matter has not been completely resolved on the parties' cross motions for summary judgment, the court declines to address the issue of attorney fees at this time. Plaintiff may renew his request after the case has reached a final resolution.

IV. CONCLUSION

*13 For the reasons stated above, the court will grant plaintiff's motion for partial summary judgment with respect to portions of the employee biographical data sheets submitted by the contractors to defendant. The court will deny plaintiff's motion in all other respects. Defendant's motion for summary judgment will be granted with respect to the technical, financial, and other

proprietary information withheld under exemption 4, with the exception of the employee data specified above. Furthermore, the court will order defendant to produce affidavits demonstrating that it has fully discharged its obligation to search for documents responsive to plaintiff's request.

*13 As to plaintiff's request for attorney fees, the court will reserve judgment until defendant has complied with the court's order and the matter has been fully resolved.

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